scheme of the statute. In this connection I do not think the debenture cases which have been mentioned are in point (*Levy* v. *Abercorris Slate and Slab Co.*[2] and *In re Perth Electric Tramways Ltd.*[3]). These cases were concerned with the question of when a debenture is issued as affecting questions of liability on the debenture.

The petition is dismissed with costs.

Petition dismissed.

Solicitors:—*Shearn, Delamore & Co.*; *Cheang Lee & Ong.*

TONG AIK (FAR EAST) LTD. v. EASTERN MINERALS & TRADING (1959) LTD.

[O.C.J. (Winslow J.) July 12, 1963]

[Singapore — Suit No. 40 of 1962]

Contract—Lump sum or divisible—Partial performance—Fault of both parties—Whether claim in quantum meruit lies.

The plaintiffs claim a sum of $65,268.54 being the balance due to them from the defendants as their agreed remuneration under a contract for work and labour carried out and materials supplied at the defendants manganese mine at Gual Periok, Kelantan. The contract *inter alia* stipulated that the plaintiffs should be able to supply the defendants with a minimum of 5,000 tons per month. The defendants deny liability on the ground that this is a lump sum contract and that the plaintiffs were in breach of the contract as they did not supply the defendants with the manganese ore as stipulated in the contract. The defendants then claimed to set-off various sums said to be due to them and counterclaimed for $800,000 being loss of profits and penalties incurred by them as a result of the plaintiffs' breach.

Held: (1) this was a divisible contract and that the plaintiffs must be paid for the tonnages of ore actually produced and/or transported to the stockpile;

(2) even if the contract was not divisible in the circumstances of this case the contract carried with it a right on the part of the plaintiffs to payment upon a *quantum meruit* for the services actually rendered.

Cases referred to:—

(1) *Sumpter* v. *Hedges* [1898] 1 Q.B. 673.

(2) *Roberts* v. *Bury Improvement Commissioners* (1870) L.R. 5 C.P. 320.

(3) *Morris* v. *Baron* [1918] A.C. 1.

CIVIL SUIT.

K. E. Hilborne for the plaintiffs.

R. C. Hoffman for the defendants.

Cur. Adv. Vult.

Winslow J.: This litigation arose out of failure to settle by negotiation differences which developed between two old friends, Mr. Tan Boon Swee and Mr. Tay Tuan Siang, in the course of the performance — or should I say, non-performance — of a contract between them contained at pages 2 and 3 of the Agreed Bundle of Correspondence (hereinafter referred to as AB2 and AB3). By novation, the plaintiff (a company subsequently formed by Mr. Tan Boon Swee) agreed to provide the labour to operate the defendants' manganese mine at Gual Periok in Kelantan according to certain specifications and to transport the manganese ore produced therefrom to specified destinations.

The contract stipulated that the plaintiffs should "be able" to supply the defendants with a minimum of 5,000 tons monthly. The plaintiffs were also responsible for providing their own transport such as lorries etc. and the cost of all fuel was to be borne by them. All machinery operating at the mine would be provided by the defendants. The plaintiffs were to be paid $6.50 per ton for operations at the mine and $7.50 per ton for transportation. AB3 reserved the right to the defendants to terminate the contract after six months if the plaintiffs were found to be unsatisfactory.

Before proceeding to discuss the exact nature of this contract and the intentions of the parties as set out in the informal agreement concluded by these letters (AB2 and AB3 of 29th August, 1960, and 1st September, 1960 respectively) and a telephonic acceptance of the conditions set out in AB3 by Mr. Tan Boon Swee, a resume of the facts leading to this agreement may not be out of place.

The defendants had acquired a mining lease of the area concerned about a year previously. This mine had apparently been successfully operated partially by some Japanese before the war. Prospecting and pitting during the year preceding the contract by an experienced though academically unqualified engineer, Mr. Bell, employed by the defendants had given rise to high hopes as to this mine's potential output which were to some extent confirmed by Mr. Fletcher, the senior managing partner of Messrs. Vallentine, Dunne & Associates Ltd., a well-established firm of mining consultants with its Head Office in Kuala Lumpur, who recommended the commencement of small scale mining for one year, in the first instance, aiming at approximately 5,000 tons per month.

On hearing about this mine Mr. Tan approached Mr. Tay and obtained the contract in question, after satisfying himself that it was a commercially workable proposition. Both parties were confident of success after consultations with their respective advisers and were hopeful of rich returns as it was to the advantage of both that the mine should be exploited to its maximum extent. It was therefore against this background of optimism that the contract was concluded and the plaintiffs commenced

mining operations in the second week of September 1960 knowing that the minimum target of 5,000 tons per month had to be attained and the first supply completed before 15th October, 1960.

It is significant, however, that no one in either the plaintiffs' firm or in the defendants' firm and neither Mr. Bell nor Mr. Fletcher had ever had any previous experience of a manganese mine. Apart from Mr. Bell and Mr. Fletcher who had had considerable experience of other forms of mining, Mr. Tan Boon Swee, who wrote the letter AB2, was the only other person connected with this enterprise who had had any mining experience and was in fact then engaged in operating an iron mine at Kepong.

The manganese mines at Gual Periok are situated at three sites, one at Bukit Lubok Itek, another at Bukit Garu and the third one at Bukit Tandak, hereinafter referred to as Itek, Garu and Tandak respectively. Mining operations commenced at Itek and subsequently shifted to Garu where a washing plant was installed with working effect from 12th March, 1961, although Itek was not abandoned entirely. Hardly any attempt was made to operate the mine at Tandak though it appears from the evidence that about 100 tons of manganese ore somehow reached the stockpile from this source. It should also be noted that Mr. Fletcher's original recommendations were based on simultaneous operations at Tandak and Itek aiming at 5,000 tons per month and that subsequently, on finding that operations were being conducted at Itek and Garu, he recommended in February 1961 (AB5) that certain additional equipment should be installed. The second jaw-crusher and conveyor belts as recommended were not, however, provided.

At no time during the entire period from 12th September, 1960, when the plaintiffs' assistant manager, Inche Ihsan bin Haji Nawawi (an ex-clerk) arrived in Gual Periok to take charge of the plaintiffs' labour force there till stoppage of work by the plaintiffs on 12th August, 1961, was the minimum amount of 5,000 tons per month ever produced.

The plaintiffs claim a sum of $65,268.54 being the balance still owed to them by the defendants as their agreed remuneration for work and labour carried out at the mine until August 1961, and for materials supplied by them to the defendants' account.

The defendants deny this liability on the ground that nothing is due to the plaintiffs because they did not supply the defendants with manganese ore according to specifications of the quantity of not less than 5,000 tons per month and were thereby in breach of contract and claim to set-off various sums said to be due to them and also counter-claim for loss of profits and penalties incurred by them as a result of the plaintiffs' breach, totalling nearly $800,000.

Before dealing with the facts it seems to me to be essential first of all to deal with the law applicable to the case because, although at the commencement of the trial it appeared to be a contest between the parties involving considerations of fact alone with "very little law", as Mr. Hilborne put it in his opening address for the plaintiffs, the trial as it developed and finally ended, posed two diametrically opposed views on the law which I propose to deal with forthwith in the course of answering the following questions which arise for consideration:—

(1) Was this an entire or lump sum contract? How does the answer to this affect the plaintiffs' claim to be paid on a *quantum meruit?*

(2) Who was to blame for the failure on the part of the plaintiffs to produce 5,000 tons of manganese ore per month?

(3) If the defendants were to blame, does this excuse the plaintiffs and thereby entitle them to succeed in a claim for work and labour done and also to defeat the counter-claim for loss of profits etc.

(4) If the plaintiffs were to blame, can they nevertheless succeed on a *quantum meruit* for the actual work done?

With regard to the first question, Mr. Hoffman, for the defendants, submitted that the contract was an entire or lump sum contract. He said that on the authority of *Sumpter* v. *Hedges* [1] the plaintiffs' claim was misconceived and that they could not recover from the defendants in respect of work done as upon a *quantum meruit* for they had abandoned the contract without producing 5,000 tons of manganese ore per month as promised, there being no evidence of a fresh contract to pay for the same. In the case cited, a builder had contracted to erect certain buildings for a lump sum. When work was only partly done he abandoned the contract. Chitty L.J. said at page 675,

> "The position therefore was that the defendant found his land with unfinished buildings upon it, and he thereupon completed the work. That is no evidence from which the inference can be drawn that he entered into a fresh contract to pay for the work done by the plaintiff. If we held that the plaintiff could recover, we should in my opinion be overruling *Cutter* v. *Powell*, and a long series of cases in which it has been decided that there must in such a case be some evidence of a new contract to enable the plaintiff to recover on a *quantum meruit* There was nothing new in the decision in *Pattinson* v. *Luckley*, but Bramwell B. there pointed out with his usual clearness that in the case of a building erected upon land the mere fact that the defendant remains in

possession of his land is no evidence upon which an inference of a new contract can be founded. He says: 'In the case of goods sold and delivered, it is easy to shew a contract from the retention of goods; but that is not so where work is done on real property'. I think the learned judge was quite right in holding that in this case there was no evidence from which a fresh contract to pay for the work done could be inferred."

Counsel therefore submitted that the plaintiffs must fail as this claim was not founded on the contract or on any subsequent agreement.

As against this view, Mr. Hilborne submitted that counsel for the defendants had misconceived the law. In his submission this was a divisible contract and not an entire or lump sum contract and that the plaintiffs should succeed on a *quantum meruit*. He further submitted that even if the contract were held to be indivisible the plaintiffs were entitled to payment for work done for so long as such a contract was *in esse*.

The distinction between "entire" and "divisible" contracts is set out clearly in Volume 8 of *Halsbury's Laws of England*, 3rd Edition, at page 166 as follows:—

"There is a distinction to be drawn between contracts which are divisible and those which are indivisible, and the distinction is of particular importance in regard to questions of illegality and questions of payment. Contracts are indivisible where the consideration is one and entire, or where it is stated or can be gathered by necessary inference that no consideration is to pass from one party till the whole of the obligations of the other party have been completed; but where no such intention can be gathered, and the contract resolves itself into a number of considerations for a number of acts, as in the case of periodical payments for a number of services which do not form one complete whole, the contract is divisible.

In an indivisible or entire contract the right to payment does not arise until the contract has been completely performed; but if there has been substantial performance a claim will be allowed subject to any counterclaim or set-off for omissions or defects in execution.

If a contract is divisible, for example where a seller of goods agrees to deliver by instalments, the right to payment arises as each part of the contract is performed and where there has been partial performance a proportionate payment may be recovered.

A claim can also be made where it can be inferred from the circumstances that there is a fresh agreement between the parties that payment shall be made for work already done or goods already supplied under the original contracts, as for example where a buyer of goods accepts less than the stipulated quantity."

The following passage from *Pollock on Contracts*, 13th Edition, at page 209 throws further light on this distinction.

"A contract which can be fulfilled only as a whole, so that failure in any part is failure in the whole, is said to be entire. A contract of which the performance can be separated, so that failure in one part affects the parties' rights as to that part only, is said to be divisible."

Applying these principles to the contract in question it would, in my opinion, be wrong to hold that it must necessarily be construed to be an entire or lump sum contract. What are the attributes of a lump sum contract which it has? There is nothing in the contract to suggest how long it was intended to last or that payment would only be made on completion of any undertaking as a whole or after the expiration of any stipulated period of time. By its very terms it is a contract containing mutually concurrent and dependent promises the performance of the promise of each party being conditional upon the promise of the other being performed at the same time. In short, on the provision of adequate machinery etc., by the defendants, the plaintiffs undertook to be able to produce 5,000 tons per month to be remunerated at the agreed rates per ton presumably until such time as the ore was exhausted or until termination otherwise. Looked at in this way it does not seem to me that this is a contract which was intended to be fulfilled only as a whole. It possesses more of the characteristics of a divisible contract to be fulfilled in parts. The distinction is not always easy to draw but it is difficult to appreciate in what the "wholeness" of the contract lies.

This is clearly not a contract in which the consideration is one and entire nor is it so stated therein, nor can it be gathered by necessary inference that no consideration is to pass from one party till the whole of the obligations of the other party have been fulfilled. The contract seems to resolve itself into a number of considerations for a number of acts to be paid for at the agreed rates per ton.

There is one unsatisfactory feature about this already somewhat unsatisfactory contract to which I should like to refer. The defendants reserved the right to terminate the contract only after six months on unsatisfactory service by the plaintiffs. Why did they bind themselves in this way? Presumably unsatisfactory service prior to the expiration of six months would not give rise to such a right. If the defendants had intended that there should be strict compliance with the letter of the contract and had intended to insist, as they now do, that the failure to produce the minimum target would be regarded as a breach going to the root of the contract or, at least, as evidence of unsatisfactory service, it is difficult to see why they should have provided that the contract would be interminable until after the first six months. One can only conclude that the defendants intended to regard the first six months as a period of trial or probation to see how the plaintiffs would shape. Subsequent developments in the performance of this contract support this view and I am of the opinion that paragraph 2 of AB3 where it says "you must be able to supply us a minimum of 5,000 tons monthly" is in the nature of an exhortation.

If the defendants had meant otherwise they would have said "you must supply a minimum of 5,000 tons monthly" and also made clear provisions as to what would happen on failure. I have therefore come to the conclusion that this is a divisible contract and that the plaintiffs must be paid for the tonnages of ore actually produced and/or transported to the stockpile.

If, however, I am held to be wrong in this conclusion about the divisible nature of this contract and that it is in fact an entire or lump sum contract, then *Sumpter* v. *Hedges, supra,* would operate to defeat the plaintiffs' claim upon a *quantum meruit* unless there is something in the evidence from which the inference can be drawn that a fresh agreement arose to pay for work done.

It seems to me that there is some such evidence here. From December 1960 to as late as 14th October, 1961 (long after the plaintiffs stopped work in August 1961) advances were made by the defendants, or on their direction, to the plaintiffs totalling $74,144.10. It seems to me to be implicit from the making of these advances that the defendants must have accepted responsibility for payment for such services. Even if they were wrong in law in thinking that they were bound to make these payments, such payments are evidential of an agreement to pay for work done. If their present stand is correct, they would have been under no obligation whatsoever to make them. Nor has any attempt been made to claim back these sums. In particular, they need not have paid $12,573 of this sum during the months of August to October 1961 (inclusive) after stoppage of work (or abandonment of contract, as they now claim) by the plaintiffs. It should be noted that some of these payments were made even after the defendants had consulted their solicitors and given notice of termination of the contract on 21st September, 1961.

To revert to *Sumpter* v. *Hedges,* Collins L.J. at page 676 said —

> "It is possible for (the plaintiff) to raise the inference of a new contract to pay for the work done.... from the defendant's having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done."

In my opinion the defendants have opted to take the benefit of the work done by the plaintiffs in extracting, cleaning and transporting the ore in question. The situation is accordingly more analogous to the acceptance of short-delivered goods than to that of a partly-built house on their own land which they would have no option but to take. Thus the inference of a fresh contract to pay can arise in another way. All things considered, I am of opinion that the contract between the parties in the present case, whether it is regarded as divisible or not, carries with it a right on the part of the plaintiffs to payment upon a *quantum meruit* for the services actually rendered thereunder.

Having cleared the preliminary legal hurdle, as to whether this is a divisible contract or not, in favour of the plaintiffs to be paid on a *quantum meruit* for the actual work done, on either point of view, it now remains for me to consider my findings of fact on the second question as to who was to blame for the failure on the part of the plaintiffs to produce 5,000 tons of manganese ore per month because this affects the counter-claim for loss of profits.

According to the contract the defendants were to provide the machinery for operations at the mine. According to Mr. Tay, the defendants merely undertook to supply the washing plant, bull-dozer, water pump, crusher and a compressor. According to Mr. Tan, machinery for excavations at the mine in the form of two T.D. shovels, was supplied by the plaintiffs although this was the defendants' responsibility.

It was obvious in the early stages of the trial that the informal agreement concluded by AB2 and AB3 did not in fact set out under all the various heads of agreement such details as one would have expected to find in a contract of this magnitude. It was also obvious that there were many details in the working of the mine which were left to be sorted out by subsequent oral arrangements. Although both parties agreed to regard AB2 and AB3, and the subsequent acceptance of AB3 by telephone, as evidence of a contract between them, it is clear from AB2 that it was an agreement "to give a contract" to the plaintiffs to hold good "until such time as a formal agreement is made out between your company and ours". No such formal agreement was ever made out and had AB2 contained such words as "subject to formal contract" the validity and enforceability of this agreement would have been open to question.

Assuming, however, that the contract was subsequently varied so as to impose responsibility for supplying only those items of machinery mentioned by Mr. Tay the question now arises whether such machinery and equipment were capable of producing the minimum target of 5,000 tons per month. Furthermore, the plaintiffs' operations at the mine were to be conducted in accordance with the specifications of Messrs. Vallentine, Dunne & Associates Ltd. and under the control and direction of the defendants' engineer. Mr. Fletcher of Messrs. Vallentine, Dunne & Associates Ltd. said that he did not

realise that his firm was mentioned in the contract nor did his firm ever give any specifications to the plaintiffs.

In deciding therefore who was to blame for the failure to produce the minimum target consideration will have to be given, as Mr. Hilborne submitted, to the following pre-requisites which he said to be proved to exist before the target could be achieved:—

(1) The mineral must be there in sufficient quantites and be reasonably capable of being located.

(2) An adequate labour force must be there to get it out.

(3) There must be adequate machinery to separate the earth from the ore i.e. to crush (if necessary) and wash and clean the ore.

(4) There should be adequate transport.

(5) The weather conditions should be favourable.

The defendants' mining consultant, Mr. Fletcher, agreed generally with these conditions. It is significant, however, that Mr. Fletcher was of the view that he himself would not have guaranteed 5,000 tons per month or advised the contractors to give such a guarantee had his advice been sought by them.

Complaint was made on behalf of the plaintiffs with regard to the first pre-requisite, to wit, that the manganese ore could not easily be located at the sites in question, that there were no boring plans showing where the mineral could be found, that the manganese in question was patch manganese, which was scattered about here and there, and that the defendants' engineer, Mr. Bell, on whom they relied for directions in the early stages, and Mr. Ng Ah Kow, who succeeded him, were unable to give them explicit directions as to the location of the ore. According to them the search for manganese was haphazard and Mr. Fletcher, when this was put to him, was inclined to agree that mining was just a little bit haphazard.

Complaint was also made with regard to the machinery at the mine. The plaintiffs claimed that the wash plant broke down often and that this impeded them in their work. According to Mr. Bell, who conveniently gave evidence on behalf of the plaintiffs, 200 tons per day could have been achieved if conveyor belts had been installed to both the wash plant and the crusher but no conveyor belts were ever provided and he said that, in the circumstances it was hard to get 70 to 100 tons per day, leaving rain, lack of fuel and break downs out of consideration. As against this, Mr. Fletcher was of the opinion that the equipment at Itek and Garu was adequate to produce 5,000 tons per month. He considered that Mr. Bell's estimate of 40 tons per 8 hours was low and that even 10 men with a hose pipe could attain that speed. Obviously he had little faith in his unqualified colleague. His target was, however, based on mining in three areas, simultaneously if possible, and in any case he had recommended concentration on Itek and Tandak in the first place. Although he considered the equipment at Garu and Itek to be adequate he seemed to think that the onus was on the contractor to know how to dig and how to discover where the ore was situated and to be able to distinguish between manganese and extraneous matter. This may well be true in the case of contracts placing such an onus on them but the facts here are that the plaintiffs had to carry out the instructions of the engineer-cum-mines manager appointed by the defendants. If the latter were unable to give precise directions to the plaintiffs should the plaintiffs be deemed to be at fault for failing to "come up to scratch"?

The evidence also showed that the wash plant was not installed till the middle of March 1961 and that, prior to that, the monsoons had been accepted as exculpatory factors by the defendants. The plaintiffs blamed the defendants for the frequent breakdowns of the wash plant and the defendants retaliated by placing the blame on the plaintiffs for providing incompetent mechanics to look after the same. Furthermore fuel to operate the plant was in short supply. This again brought forth recriminations on both sides.

The defendants also said that the plaintiffs did not perform their part of the contract in a competent and workman-like manner and that they, *inter alia*, failed to pay their labourers and the defendants had to come to the rescue from time to time. Furthermore, the plaintiffs borrowed six diesel lorries from the defendants to assist them in carrying out their obligations under the contract with regard to transportation of ore. As against this, the plaintiffs claimed that their own lorries were used in helping in road construction which was the defendants' responsibility. The plaintiffs also said that they supplied two T.D. shovels for operations at the site which should, in fact, have been supplied by the defendants. It was in connection with these shovels that the negotiations for an amicable settlement broke down and they form the subject matter of another suit.

Taking all these factors into consideration it seems to me almost impossible to conclude that the fault or the failure to attain the minimum target lay solely with the plaintiffs since it was quite apparent that there was mutual moral, physical and contractual dependency between the parties and that both had to co-operate, the one

with the other, simultaneously, in order to achieve the desired result. Whilst it may be true that cases may be conceived in which a man may undertake to do that which turns out to be impossible and yet be still bound by his agreement, this case does not appear to be one to which this principle can be applied.

Mr. Hilborne submitted that, if a party to a contract, through his own act or omission, prevents the other party from carrying out the contract, he cannot succeed against the party in default and that the latter is excused from performance of his contract. He relied for this proposition on the following passage from *Pollock on Contracts*, 13th Edition at page 219 —

> "Where a promisor is prevented from performing his contract or any part of it by the default or refusal of the promisee, the performance is to that extent excused; and moreover default or refusal is a cause of action on which the promisor may recover any loss he has incurred thereby, or he may rescind the contract and recover back any money he has already paid under it. Default may consist either in active interruption or interference on the part of the promisee, or in the mere omission of something without which the promisor cannot perform his part of the contract."

He relied further on the rule of law referred to in *Roberts* v. *Bury Improvement Commissioners* [4] which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party. Accepting these propositions, which I do, it seems to me that the failure on the part of the plaintiffs to attain the minimum target was due, partially, at least, to the failure on the part of the defendants to provide adequate machinery and competent supervision as undertaken and in failing to conduct their mining operations strictly in accordance with the advice of their mining consultants.

In any case the washing plant was not installed until the middle of March 1961 and it is clear that the plaintiffs could not possibly be blamed for any failure prior to this date, having further agreed to excuse any default on the part of the plaintiffs in respect of the monsoon period. It was only after May 1961 after the six month period mentioned in the contract had expired, that the defendants impressed on the plaintiffs "the absolute necessity of having to try very hard to secure the target" (AB15). It seems strange why they did not exercise their right to terminate the contract at that stage if they themselves were faultless.

One cannot help forming the impression, judging by the language used by the defendants in AB15 about "trying hard to secure the target", that they themselves knew that it was wellnigh impossible to attain that target. In all the circumstances they were no doubt aware that they themselves were in default in not providing the various additional items of equipment recommended by Mr. Fletcher. They were even prepared to concede at AB17 that a second washing plant should be provided to avoid further complaints. In June 1961, at AB14, they gave a warning for the first time that the first shipment of 5,000 tons should be ready by mid-July and threatened the plaintiffs that if they did not make every effort to effect the first shipment of 5,000 tons they would have no alternative except to divert any penalty due to the lighterage contractors to the plaintiffs.

It was at about this time that, according to the evidence, they insisted upon double washing and double picking in order to ensure the attainment of certain standards required in the world market. There is nothing to indicate that in the early stages of the contract these requirements were passed on to the plaintiffs.

As has been noticed, the plaintiffs were required to produce 5,000 tons of ore per month according to the specifications of the consulting engineers, Messrs. Vallentine, Dunne & Associates Ltd. Mr. Fletcher however did not realise that his firm had been mentioned in the contract and there is no evidence that any specifications were in fact given to the plaintiffs by his firm. The only other person who could possibly have conveyed any idea of the required standards or specifications was Mr. Bell and it is not clear from the evidence that he did in fact convey any particular specifications to the plaintiffs or to point out what impurities should be removed. Although Mr. Tay's evidence is to the effect that ore of any grade would suffice the evidence is certainly somewhat obscure as to whether the defendants' engineer conveyed any adequate directions to the plaintiffs as to how exactly the ore should have been purified. The plaintiffs did in fact extract quantities of manganese-bearing ore from the sites at Itek and Garu but these quantities became necessarily reduced after the removal and disposal of impurities following Mr. Tay's insistence on double picking and double washing. Of the actual quantities at the stockpile only about 1,400 tons appear to have been sold and there is still a quantity of ore produced by the plaintiffs which, though saleable, has not yet been sold.

In particular, on 27th June there were about 8,000 tons of manganese ore in all at Gual Periok and hand picking was insisted upon in order to ensure the quality of the ore for shipment. On 28th June, 1961, at AB15 the plaintiffs were again exhorted to take a serious view of the matter and it was stressed that a second

shipment would be required to be made between 23rd and 24th August. On 29th June, 1961, at AB16 the plaintiffs wrote explaining why they had been unable to attain the target which they said was due to a number of failings on the part of the defendants and that failure to obtain the target was not a responsibility resting entirely on the plaintiffs' shoulders. They appreciated that "they would be as doom *(sic)* as the defendants in not producing 5,000 tons per month."

The tone of the correspondence from AB10 to AB15 certainly suggests that the letter of the original contract as to the minimum monthly target was not intended to be acted upon. In fact at AB10 the plaintiffs promised merely to show "progress of production". At AB11 they asked for an increase in price per ton and at AB13 the defendants, in reply, said that they would increase the price to $16 per ton altogether if 5,000 tons per month were produced. It seems to follow from this that any production short of this would be paid for at the originally agreed rates of $14 per ton.

AB14 and AB15 appear to be more concerned with diverting penalties due to the lighterage contractors to the plaintiffs if shipments of 5,000 tons per month thereafter were not effected. It seems to me that the defendants had effectively waived their rights under the contract and were more concerned from June 26th, 1961, onwards with the possible penalties they would incur and became anxious to pass these on to the plaintiffs.

If I am right in this conclusion about waiver it seems to me that the same conclusion can be reached as by accepting Mr. Hilborne's argument that this was a contract to be dealt with as upon a *quantum meruit.*

I find also that, not only were no instructions given to the plaintiffs to discharge ore into the lighters in July, but that Mr. Heng Ah Seng for the defendants expressly gave instructions that this should not be done. Mr. Heng was not called to rebut this evidence.

Mr. Bell, moreover, stated in evidence that the conveyor belt at Palekbang for discharging ore into the lighters was not working properly and was not put right till 28th August, 1961. This does not appear to be a responsibility for which clear provision has been made in the contract but it seems to me that the plaintiffs cannot be blamed for it.

Mr. Bell gave evidence which tended to exonerate the plaintiffs on all major points and it must be remembered that he was the person who had overall responsibility for the mine vis-a-vis the Mines Department. Mr. Fletcher, despite his undoubtedly superior qualifications, was never in actual physical control and day-to-day direction of the operation of the machinery and equipment at the mine-sites so as to be able to speak with first-hand knowledge of their actual capacities. For some of the data as to capacity he even had to rely on catalogues (as in the case of the crusher's capacity). Much as I think that he was well-qualified for the purpose of advising as to the general efficacy of machines on visual inspection, I am not entirely satisfied that, in respect of the actual productive capacity of such machines, he could have been as positive as he appeared to be that they were, in fact, capable of measuring up to his expectations. Even if they were, which I doubt, there are other factors, such as lack of adequate directions by the resident engineer appointed by the defendants, and failure to abide by Mr. Fletcher's own recommendations which tend, in my view, to excuse the plaintiffs even though they themselves were not proved to have been as diligent as they could have been. If it were permissible to apportion blame for the failure of the entire undertaking I would say that both parties were equally at fault. But whilst this may excuse the plaintiffs it does not entitle the defendants to succeed on a counter-claim for loss of profits or penalties payable to the lighterage contractors.

The plaintiffs claimed that mutual termination of the contract had taken place by consent after they stopped work on 12th August, 1961. Whilst I do not think it necessary to decide the point, having regard to the conclusions I have reached, I would however, if necessary, be prepared to hold that there was an oral agreement to terminate the contract after stoppage of work although the defendants were not prepared to take over the plaintiffs' labour force. The fact that negotiations for settlement were in progress supports this. I do not agree with Mr. Hoffman's submission that a contract of this nature cannot be terminated orally and that it can only be terminated by writing under seal or for consideration. *Morris* v. *Baron* [3] is a clear authority against him. That case went so far as to hold that even a contract required to be in writing could be terminated by parol agreement. In the case of such contracts variations would be required to be in writing but extinction would not.

It now remains for me to give effect to the conclusions I have reached above in relation to the various heads of claim, set-off and counter-claim.

The plaintiffs' claim is for $65,268.54. Most of the items relating to this claim were agreed by Mr. Tay and supported by vouchers

and receipts. Subject to the amounts to be set-off against this claim, I allow his claim in the round sum of $62,500 after making a small deduction in respect of those items which were not strictly supported by documents or agreed by Mr. Tay.

In their defence the defendants claim to set-off against the plaintiffs' claim an amount of $18,466.81 arrived at my deducting the sum of $5,494.75 for which credit has been given in the plaintiffs' claim from a total indebtedness of $23,961.56 for fuel and heavy oil supplied and handling charges incurred by the defendants on the plaintiffs' account. In my opinion this claim for set-off is well grounded in that I find that the plaintiffs were responsible for payment in respect of all fuel and heavy oil used at the mine. This conclusion is supported by Mr. Tan Boon Swee's own evidence as to this estimate of $100 which he said was the daily cost of fuel at the mine including fuel and heavy oil for lorries, tippers and for the washing equipment. I accept Mr. Tay Tuan Siang's evidence that he passed on this responsibility to the plaintiffs entirely and that this was reflected in his offer of the high rate of $6.50 per ton for operations at the mine whereas the plaintiffs' operational cost was only $2.70 per ton. Although there was evidence that Mr. Tay had initialled a bill in this respect for $5,494.75 during the negotiations for settlement the negotiations broke down. I do not think that the smaller figure should be held to be binding on Mr. Tay in all the circumstances because it no doubt took into consideration the fact that the plaintiffs made other facilities available to the defendants such as the loan of their lorries on road construction works and the provision of T.D. shovels. It was on this last issue that negotiatons broke down.

I would also allow the defendants' claim to set-off against the plaintiffs' claim the sum of $38,500 advanced on behalf of the defendants by Tong Nam contractors which I find was in fact made.

I reject the defendants' claim to the sum of $19,183.50 as set out in paragraph 13 of the defence for the hire of lorries to the plaintiffs as I find no contractual basis for this charge.

I also reject the defendants' counterclaim for loss of profits which I consider somewhat far-fetched in all the circumstances and for the compensation paid by them to their lighterage contractors.

Judgment will therefore be entered for the plaintiffs in the sum of $5,533.19 with costs. The counterclaim is dismissed with costs.

Judgment for the plaintiff.

Counterclaim dismissed.

Solicitors:—*Allen & Gledhill; Hilborne, Chung & Co.*

YONG MOI & ANOR. v. ASIA INSURANCE CO. LTD.

[O.C.J. (Tan Ah Tah J.) July 27, 1963]

[Singapore — Suit No. 555 of 1962]

Insurance—Deceased passenger of car—Car driven by friend of deceased—Car borrowed by deceased—Judgment obtained under ss.7 and 12 of Civil Law Ordinance—Whether administratrix can recover whole amount under s.8(1) Motor Vehicles (Third Party Risks and Compensation) Ordinance, 1960—Whether liability covered by policy—Interpretation of policy—Civil Law Ordinance (Cap. 24), ss.7 and 12.

Motor Vehicles (Third Party Risks and Compensation) Ordinance, 1960, s.8(1).

The plaintiffs are the administratrix and co-administrator respectively of one W deceased who was killed while travelling as a passenger in a car which the deceased had borrowed and which was at the material time driven by Y. At all material times there was in force a policy of insurance issued by the defendants covering the owner or in relation to the user of the car within the scope of the policy in respect of the death or bodily injury to any person. The plaintiffs obtained judgment against Y for the sum of $2,800 under section 7 and $23,000 under section 12 of the Civil Law Ordinance, the whole amount to be paid to the Public Trustee. They now seek to recover the whole amount of the judgment from the defendants under section 8(1) of the Motor Vehicles (Third Party Risks and Compensation) Ordinance, 1960, on the ground that the liability in respect of which the judgment was obtained against Y was one which was covered by the terms of the policy which reads as follows: "3. In terms of and subject to the limitations of the indemnity which is granted by this section to the Insured the Company will indemnify any person who is driving such Motor Car on the Insured's order or with his permission provided that such person (a) is not entitled to indemnity under any other Policy (b) shall as though he were the Insured observe fulfil and be subject to the terms exceptions and conditions of this Policy in so far as they can apply (c) holds a licence to drive such Motor Car or has held and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf for holding or obtaining such a licence."

It was established as a fact that Y had complied with terms (a) and (c) of para 3 of the policy and it was established that Y was not driving on the owner's order or express permission. The question for determination was therefore whether Y was driving the car with the implied permission of the owner.

Held: it is probably impossible to state in comprehensive terms any principle which will enable it to be determined in every case whether implied permission had been given to the third person to drive the car. The determination of that question depends upon the view that is taken of the matter after consideration of the circumstances of each case. On the facts of the present case it cannot be said that the car was being driven by Y with the owners implied permission.